Teo Sui Chin & Ors v Registrar of Land and Survey Kuching Division & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01(NCvC)(A)-495–09 OF 2020
YAACOB SAM, RAVINTHRAN AND AZIMAH OMAR JJCA
3 OCTOBER 2023

Land Law — Easement — Extinguishment of — Superintendent of Lands and Surveys endorsed private easement on third respondent's land for benefit of appellants as registered proprietors of adjacent land — Registrar of Land and Survey extinguished easement on ground that necessity for easement had ceased to exist due to subsequent availability of public access road — Whether extinguishment of easement justifiable — Whether issue regarding subsistence of easement had been determined by previous Court of Appeal in its decision — Whether res judicata applicable — Whether appellants were deprive of right to be heard due to failure of Registrar of Land and Survey to conduct formal inquiry under s 141 of Sarawak Land Code — Sarawak Land Code ss 34, 141 & 203

The appellants were the registered proprietors of a land known as Lot 255 located in Kuching, Sarawak whereas the third respondent was the registered proprietors of a land adjacent to Lot 255 known as Lot 254. Due to the absence of any public access road to Lot 255, the then Superintendent of Lands and Surveys had endorsed a private right of way ('easement') to be allowed along Lot 254 for the benefit of Lot 255 via Memorandum No L2396/66 ('the 66 Memorandum'). The issue between the parties first arose when the third respondent decided to construct a concrete wall along the boundary of the easement which led to the filing of the first High Court suit by the appellants premised on the argument that the said concrete wall had encroached into the said easement. It ought to be noted that the width of the easement had always been less than 16 feet for the past 50 years even with the subsequent construction of the concrete wall. The High Court had dismissed the appellants' action and ruled that the appellants upon their own 50 years' indolence were now estopped from crying foul against the fact that the easement was not 16 feet wide as per the terms of the 66 Memorandum. Further, there was no necessity for the court to grant declaratory relief as the third respondent was well within her statutory rights to later apply to the Registrar of Land and Survey Kuching Division ('the first respondent') to extinguish the easement on the ground that the necessity for the easement had irrefutably ceased to exist due to the subsequent availability of a public access road (via Persiaran Cooke) ('Cooke's Drive') to access the appellants' land ('the first HC's decision'). The appellants then filed an appeal against the said decision. The Court of Appeal allowed the appeal without negating, vitiating,

or dismissing the third respondent's rights to apply for the extinguishment of the easement under the Sarawak Land Code ('the SLC'). The Court of Appeal largely disagreed that estoppel should apply to extinguish only a part of the easement when the operation of a statute already provided a different manner and method of extinguishing the entirety of an easement under s 141 of the SLC ('the first COA's decision'). Following the said decision, the third respondent had applied under s 141 of the SLC to the Superintendent of Lands and Surveys for the extinguishment of the easement and after careful inquiry and assessment, the Superintendent issued a notice of intent to extinguish the easement to both the appellants and the third respondent. As the appellants had not responded to the gazette notification and had utterly failed to show any cause to the contrary, the first respondent proceeded to register the extinguishment of the easement on the third respondent's Instrument Document of Title of Lot 254 ('the extinguishment endorsement'). The appellants then filed an appeal against the extinguishment endorsement pursuant to s 203 of the SLC but the said appeal was dismissed by the High Court, hence, the present appeal. As in the court below, the appellants' main arguments were: (a) the easement was a statutory registered easement and did not depend on the necessity to which the easement was originally granted; (b) res judicata applied to estop the High Court to determine the subsistence of the easement which had already been allegedly been decided vide the COA's first decision; and (c) the appellants were deprived of the opportunity to be heard as the first respondent had failed to conduct a formal inquiry under s 141 of the SLC. The crux of the appeal was in relation to the justifiability of the extinguishment of the private easement by the first respondent.

Held, dismissing the appeal in toto with costs of RM10,000 for each of the first and second respondents and RM20,000 for the third respondent:

(1) There was no utility at all in the appellants' attempt to distinguish between a 'statutory registered easement' and an 'implied easement of necessity'. It was never put into question that the subject easement was registered under the 66 Memorandum. It was certainly befuddling that the appellants somehow were insinuating that an easement across a neighbour's land could exist or be granted willy-nilly without any appropriate and just necessity. Just because the easement was a statutory registered easement did not at all mean that the easement could reign supreme free from any rules of law or principles of justice. The reference to the word 'implied' arose in the learned judicial commissioner's grounds of judgment was not at all an insinuation by the learned judicial commissioner ('the JC') that the easement was an 'implied easement'. Instead, the JC had rightfully stated that the easement was initially created to accommodate the implied rights of a proprietor under s 34 of the SLC which also included the right to access his land 'without boats or vehicles' (see paras 30–32).

(2) Considering the deliberation above, the court agreed with the learned JC that the easement could only stand when the necessity for access subsisted. The moment the necessity ceased (due to the availability of Cooke's Drive) it would thoroughly be unjust to prolong the deprivation of that portion of Lot 254 from the third respondent. Thus, the court ultimately agreed that the learned JC was correct in finding that the first respondent's extinguishment of the easement was valid in law (see para 41).

(3) There were no merits whatsoever to the appellants' reliance on the doctrine of res judicata. Neither the first HC's decision nor the first COA's decision decided against the third respondent's rights to at least apply for the easement to be extinguished under the law. At best, the first COA's decision only went as far to remark that the third respondent had not yet applied for the extinguishment under the relevant law (which the third respondent later indeed proceeded to do so). Thus, during the first COA's proceeding, the Court of Appeal then had opted not to discuss the merit of the third respondent's right to extinguishment and only proceeded to decide on the basis of procedures (or lack thereof). It was trite law that res judicata did not apply until and unless the matter was decided on its merits (see paras 42–43).

(4) The appellants were given full opportunity to show any cause against the extinguishment of the easement but had only opted to throw the first HC's decision and the first COA's decision to the first respondent's face. Never at any time did the appellants ever furnish any material or substantial challenge against the availability of Cooke's Drive as a viable public access road. Further, the court agreed with the learned JC that there were no provisions whatsoever within the law to support the appellants' insistence that a 'formal inquiry' must be conducted by the first respondent before the extinguishment. In fact, even if there was any requirement for such formal inquiry, the court found that the series of correspondences which involved the appellants' solicitors and calls for show cause were already clear evidence of a formal inquiry conducted by the first respondent (see paras 45–46).

[Bahasa Malaysia summary

Perayu-perayu adalah pemilik-pemilik berdaftar tanah yang dikenali sebagai Lot 255 yang terletak di Kuching, Sarawak manakala responden ketiga adalah pemilik berdaftar tanah bersebelahan dengan Lot 255 yang dikenali sebagai Lot 254. Disebabkan ketiadaan jalan masuk awam ke Lot 255, Penguasa Tanah dan Ukur ketika itu telah mengesahkan hak lalulalang persendirian ('isemen') untuk dibenarkan di sepanjang Lot 254 untuk faedah Lot 255 melalui Memorandum No L2396/66 ('Memorandum 66'). Isu antara pihak-pihak pada mulanya timbul apabila responden ketiga memutuskan untuk membina tembok konkrit di sepanjang sempadan isemen tersebut yang membawa

kepada pemfailan saman Mahkamah Tinggi pertama oleh perayu-perayu berdasarkan hujah bahawa dinding konkrit tersebut telah menceroboh ke dalam isemen tersebut. Perlu diingatkan bahawa lebar isemen tersebut sentiasa kurang daripada 16 kaki selama tempoh 50 tahun yang lalu walaupun selepas pembinaan dinding konkrit tersebut. Mahkamah Tinggi telah menolak tindakan perayu-perayu dan memutuskan bahawa perayu-perayu atas kemalasan mereka sendiri selama 50 tahun kini telah terhalang daripada mempersoalkan fakta bahawa isemen tersebut bukanlah selebar 16 kaki mengikut syarat-syarat Memorandum 66 tersebut. Tambahan pula, tiada keperluan bagi mahkamah untuk memberikan relief pengisytiharan kerana responden ketiga mempunyai hak berkanun untuk kemudiannya memohon kepada Pendaftar Tanah dan Ukur Bahagian Kuching ('responden pertama') untuk menghapuskan isemen tersebut atas alasan bahawa keperluan untuk isemen tersebut tidak lagi wujud kerana terdapatnya jalan masuk awam (melalui Persiaran Cooke) ('Cooke's Drive') untuk mengakses tanah perayu-perayu ('keputusan pertama MT'). Perayu-perayu kemudian memfailkan rayuan terhadap keputusan tersebut. Mahkamah Rayuan membenarkan rayuan tanpa menafikan, membatalkan atau menolak hak responden ketiga untuk memohon penghapusan isemen tersebut di bawah Kanun Tanah Sarawak ('KTS'). Mahkamah Rayuan sebahagian besarnya tidak bersetuju bahawa estoppel terpakai untuk menghapuskan hanya sebahagian daripada isemen tersebut apabila keperluan statut telah menyediakan cara dan kaedah yang berbeza untuk menghapuskan keseluruhan isemen tersebut di bawah s 141 KTS ('keputusan pertama MR'). Berikutan keputusan tersebut, responden ketiga telah memohon di bawah s 141 KTS kepada Penguasa Tanah dan Ukur untuk menghapuskan isemen tersebut dan selepas siasatan dan penilaian yang teliti, Penguasa mengeluarkan notis niat untuk menghapuskan isemen tersebut kepada kedua-dua perayu-perayu dan responden ketiga. Oleh kerana perayu-perayu tidak memberi maklum balas kepada pemberitahuan warta dan telah gagal sama sekali menunjukkan apa-apa sebab yang bertentangan, responden pertama meneruskan untuk mendaftarkan penghapusan isemen tersebut pada Dokumen Instrumen Hakmilik responden ketiga bagi Lot 254 ('pengendorsan penghapusan'). Perayu-perayu kemudian memfailkan rayuan terhadap pengendorsan penghapusan tersebut menurut s 203 KTS tetapi rayuan tersebut telah ditolak oleh Mahkamah Tinggi, justeru, rayuan semasa. Seperti dalam mahkamah di bawah, hujah-hujah utama perayu-perayu ialah: (a) isemen tersebut adalah isemen berkanun berdaftar dan tidak bergantung kepada keperluan yang mana isemen tersebut pada asalnya diberikan; (b) res judicata terpakai untuk menghentikan Mahkamah Tinggi untuk menentukan kewujudan isemen yang didakwa telah diputuskan melalui keputusan pertama MR; dan (c) perayu-perayu telah dinafikan peluang untuk didengari kerana responden pertama telah gagal menjalankan siasatan rasmi di bawah s 141 KTS. Inti pati rayuan semasa adalah berkaitan dengan kewajaran penghapusan isemen persendirian tersebut oleh responden pertama.

Diputuskan, menolak keseluruhan rayuan dengan kos sebanyak RM10,000 kepada setiap responden pertama dan kedua dan RM20,000 kepada responden ketiga:

(1) Tiada merit sama sekali dalam percubaan perayu-perayu untuk membezakan antara 'isemen berdaftar berkanun' dan 'isemen tersirat keperluan'. Tidak pernah dipersoalkan bahawa isemen tersebut telah didaftarkan di bawah Memorandum 66. Memang mengelirukan apabila perayu-perayu entah bagaimana membayangkan bahawa isemen merentasi tanah jiran boleh wujud atau diberikan sewenang-wenangnya tanpa apa-apa keperluan yang sesuai dan adil. Hanya kerana isemen tersebut merupakan isemen berdaftar berkanun tidak sama sekali bermakna isemen tersebut boleh berkuat kuasa bebas daripada keperluan undang-undang atau prinsip keadilan. Rujukan kepada perkataan 'tersirat' yang timbul dalam alasan penghakiman pesuruhjaya kehakiman yang bijaksana itu sama sekali bukanlah bayangan oleh pesuruhjaya kehakiman yang bijaksana ('PK') bahawa isemen tersebut adalah 'isemen tersirat'. Sebaliknya, PK telah menyatakan dengan betul bahawa isemen tersebut pada mulanya diwujudkan untuk memenuhi hak tersirat pemilik di bawah s 34 KTS yang juga termasuk hak untuk mengakses tanahnya 'without boats or vehicles' (lihat perenggan 30–32).

(2) Mengambil kira pertimbangan di atas, mahkamah bersetuju dengan PK yang bijaksana bahawa isemen tersebut hanya boleh bertahan apabila keperluan untuk akses wujud. Sebaik sahaja keperluan tersebut terhenti (disebabkan ketersediaan Cooke's Drive) adalah tidak adil untuk memanjangkan penafian ke atas bahagian Lot 254 tersebut daripada responden ketiga. Oleh itu, mahkamah akhirnya bersetuju bahawa PK yang bijaksana adalah betul dalam mendapati bahawa penghapusan isemen tersebut oleh responden pertama adalah sah di sisi undang-undang (lihat perenggan 41).

(3) Tiada apa-apa merit kepada pergantungan perayu-perayu terhadap doktrin res judicata. Kedua-dua keputusan pertama MT dan keputusan pertama MR tidak menafikan hak responden ketiga untuk sekurang-kurangnya memohon agar isemen tersebut dihapuskan di bawah undang-undang. Jika ada pun, keputusan pertama MR hanya menyatakan bahawa responden ketiga belum lagi memohon penghapusan di bawah undang-undang yang berkaitan (yang mana kemudiannya responden ketiga telah berbuat demikian). Oleh itu, semasa prosiding MR pertama, Mahkamah Rayuan kemudiannya telah memilih untuk tidak membincangkan merit hak responden ketiga untuk penghapusan tersebut dan hanya membuat keputusan berdasarkan prosedur (atau kekurangannya). Ia adalah undang-undang yang mantap bahawa res judicata tidak terpakai sehingga dan melainkan perkara tersebut diputuskan berdasarkan meritnya (lihat perenggan 42–43).

(4) Perayu-perayu telah diberi peluang sepenuhnya untuk menunjukkan apa-apa sebab untuk menentang penghapusan isemen tersebut tetapi hanya memilih untuk melemparkan keputusan pertama MT dan keputusan pertama MR kepada responden pertama. Tidak pernah pada bila-bila masa perayu-perayu memberikan apa-apa cabaran yang material atau besar terhadap ketersediaan Cooke's Drive sebagai jalan akses awam yang boleh digunakan. Selanjutnya, mahkamah bersetuju dengan PK yang bijaksana bahawa tiada apa-apa peruntukan dalam undang-undang untuk menyokong desakan perayu-perayu bahawa 'siasatan rasmi' mesti dijalankan oleh responden pertama sebelum penghapusan tersebut. Malah, walaupun terdapat apa-apa keperluan untuk siasatan rasmi sedemikian, mahkamah mendapati bahawa siri surat-menyurat yang melibatkan peguam cara perayu-perayu dan panggilan tunjuk sebab sudah pun menjadi bukti jelas tentang siasatan rasmi yang dijalankan oleh responden pertama (lihat perenggan 45–46).]

Cases referred to

Kettel and others v Bloomfold Ltd [2012] EWHC 1422 (Ch), Ch D (refd)
Liow Tow Thong & Ors v Pentadbir Tanah Alor Gajah & Ors [1998] 1 MLJ 79, HC (refd)
Messrs Roland Cheng & Co v Konkamaju Sdn Bhd [2014] 1 MLJ 894, CA (folld)
Si Rusa Inn Sdn Bhd & Ors v The Collector of Land Revenue Port Dickson & Ors [1987] 1 MLJ 147 (refd)
The State Government of Sarawak & Ors v Teo Soo Chuan [2014] 4 MLJ 114, CA (folld)

Legislation referred to

Land Code (Cap 81) ss 34, 43, 141, 203
Land (Control of Sub-Division) Ordinance (Cap 82)

Appeal from: *Teo Sui Chin & Ors v Registrar of Land and Survey Kuching Division & Ors* [2022] MLJU 3549 (High Court, Kuching)

Ronald SL Ong (with Chong Siew Chiang) (Chong Brothers Advocates) for the appellant.
Nur Azhar bin Bujang (Sarawak State Attorney General's Chambers) for the first and second respondents.
Chan Siew Yan (Ee & Lim Advocates) for the third respondent.

Azimah Omar JCA:

INTRODUCTION

[1] The appeal before us concerns a case of the extinguishment of a private easement (which was initially granted to the appellants out of necessity) by the Registrar of Land and Survey Kuching Division ('first respondent') exercising his authority under s 141 of the Sarawak Land Code ('the SLC') when it was found that the previous necessity for the easement had already ceased due to the subsequent availability of a public access road (via Persiaran Cooke) to access the appellants' land.

[2] The factum of the appellants' land being no longer landlocked, and the accessibility of the public access road to the appellants' land remains entirely undisputed. The only challenge the appellants had mounted against the extinguishment was merely leveraged on some alleged 'procedural error' in breach of the SLC and res judicata in view of an alleged earlier Court of Appeal decision which allegedly was decided in favour of the appellants (which in actuality was not).

[3] There was a barrage of technical issues raised in the present appeal which we have identified to be no more than smoke and mirrors to detract us from the core and pure substance of the matter being the justifiability of the extinguishment of the private easement by the first respondent. We believe that it is far more practicable and just that we directly address the core substance of the present appeal, rather than unnecessarily protracting our deliberation on mere matters of technicality.

BACKGROUND FACTS

[4] For better understanding of the matter at hand. it is necessary for us to lay down the essential facts of the case which had led the appellants to file the present appeal.

[5] The four appellants here ('the plaintiffs/appellants') are the registered proprietors of a piece of land situated in Lot 255, Section 18, Kuching Town Land District ('Lot 255').

[6] Lim Siok Luan ('the third respondent') is the registered proprietor of the land immediately adjacent to Lot 255, situated in Lot 254, Section 18, Kuching Town Land District ('Lot 254'). Both Lots 255 and 254 sits along the same row of land with Lots 256 and 257.

[7] It was an admitted fact that circa 1966 the only lot with direct access to

a public road ('Jalan Green') was the third respondent's Lot 254. Out of pure necessity (due to the absence of any public access road to Lot 255), the then Superintendent of Lands and Surveys had endorsed a private right of way ('easement') to be allowed along Lot 254 for the benefit of Lot 255, and the same between Lots 256 and 257 via Memorandum No L2396/66 ('the 66 Memorandum'). A B

[8] The 66 Memorandum stipulated that the easement through Lot 254 shall be 16 feet wide. Accordingly, an access road was built through Lot 254 (although less than the stipulated 16 feet). Notwithstanding, for almost 50 years, there has never been any issues or complaints whatsoever regarding the propriety of the built-up easement. In respecting the establishment of the easement (as well as for privacy and security purposes), the third respondent's late husband (the original proprietor of Lot 254) had set up a chain-link fence along the boundary line of the easement. C D

[9] Upon the passing of the third respondent's late husband, the third respondent circa 2012 (46 years after the 66 Memorandum), was concerned of her safety and security at home and thus, replaced the original chain link fence with a concrete wall along the same boundary line of the easement. The original chain link fence was also already damaged due to multiple break in incidents a year prior. E

THE FIRST HIGH COURT AND COURT OF APPEAL PROCEEDINGS F

[10] The replacement of the chain link fence using the concrete wall somehow disgruntled the appellants. After almost 50 years of silence, the appellants in 2014 commenced Suit No KCH-22NCVC-59/9 of 2014 (HC2) ('first HC suit') against the third respondent's conduct of constructing the replacement concrete wall. G

[11] The appellants after almost half a century, now suddenly claimed that the concrete wall had encroached into the easement and thereby causing the easement to be less than 16 feet wide as required under the 66 Memorandum (although in actuality, the concrete wall had not reduced the size of the easement which was already less than 16 feet wide since it was first constructed 50 years ago). H

[12] Around the same time the first HC suit was set into motion, it remains an entirely unrefuted fact that recent development of the area had led to the existence of a new public access road (which was previously private road) ('Cooke's Drive') which now provides direct public access to Lot 255. In fact, there was already evidence that the proprietor of Lot 256 had already opened up its boundary and constructed a gate to directly access Cooke's Drive. I

Therefore, at this juncture circa 2014, the core necessity to encroach the third respondent's land for the sake of the easement had already totally and entirely ceased to exist.

[13] The third respondent at this time had not yet applied for any termination or extinguishment of the easement simply because there were no reasons to do so considering the appellants' decades' long non-issue regarding the easement. Nonetheless, when the first HC suit was sprung on the third respondent:

(a) the Registrar of Land and Survey Kuching Division (the first respondent) was not made a party in the appellants' first HC suit; and

(b) the third respondent had yet to apply to the first respondent under s 141 of the SLC to extinguish the easement.

[14] The learned High Court judge in the first High Court Suit had dismissed the appellants' first HC suit mainly on the following grounds:

(a) the appellants upon their own 50 years' indolence are now estopped from crying foul against the fact that the easement was not 16 feet wide as per the terms of the 66 Memorandum; and

(b) there is no necessity whatsoever for the court to grant declaratory relief as the third respondent was well within her statutory rights to later apply to the first respondent to extinguish the easement on the ground that the necessity for the easement had irrefutably ceased to exist.

[15] Upon the appellant's appeal against the first HC suit decision, the Court of Appeal allowed the appeal *without negating, vitiating, or dismissing the third respondent's rights to apply for the extinguishment of the easement under the SLC*. The Court of Appeal largely disagrees that estoppel should apply to extinguish only a part of the easement when the operation of a statute already provided a different manner and method of extinguishing the entirety of an easement under s 141 of the SLC ('first COA decision'):

> *We note that as a general rule an easement depends entirely for its existence on the grant which creates it*, and if the grant which creates it creates it for a certain duration, when that time has elapsed the grant is gone (see: *Lord Dynevor v Tennant* (1886) 32 ChD 375). Since the grant of the easement (under s 10 of the Land (Control of Subdivision) Ordinance (Cap 82)) does not contain any provision as to time limitation, its determination or extinguishment by effluxion of time does not arise or apply — see Judith Sihombing, *The National Land Code A Commentary*; para [954], Chapter XXIII, ss 282–291; *Chin & Sons Sdn Bhd & Ors v William Crocket & Ors* [2000] 5 MLJ 497.
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> In the same token, the defendant's contention that since the driveway was only as wide as the chain-link fence allowed for the past 48 years, the plaintiffs should be

estopped from insisting a 16ft access road now is fallacious. As we had mentioned above, this proposition clearly goes again the very source of the grant which must be adhered to strictly *unless determined or extinguished according to law*, which we find the defendant has failed to do in this case. (Emphasis added.) (See *Teo Sui Chin & Ors v Lim Siok Luan* [2020] 1 MLJ 670)

[16] It was obvious that the Court of Appeal only took issue against the High Court's preference of the doctrine of laches (estoppel due to delay or effluxion of time) over the prescribed statutory provisions governing the granting and extinguishment of easements under the SLC. Never at any point in the Court of Appeal's decision did the Court of Appeal address the necessity of the continued existence of the easement. The Court of Appeal took issue with the fact that the third respondent at the time, had not yet made the appropriate application under s 141 of the SLC for the first respondent to extinguish the easement.

[17] Following the terms of both the first High Court and Court of Appeal decision, the third respondent duly applied under s 141 of the SLC to the Superintendent of Land and Survey ('the Superintendent') for the extinguishment of the easement via a letter dated 3 September 2018 ('the extinguishment application').

[18] In response to the extinguishment application, the Superintendent accordingly embarked on an inquiry which involves written correspondences between all relevant parties (inclusive of the solicitors representing the appellants) ('the inquiry').

[19] It must strictly be kept in mind that the appellants were undoubtedly involved and were given the opportunity to oppose the extinguishment application.

[20] We have perused this series of correspondences between the appellants' solicitors, the Superintendent, and the third respondent during the inquiry which went on from September 2018 to November 2018. The flow of the inquiry went as follows:

(a) the third respondent applied for the extinguishment of the easement due to the new existence of Cooke's Drive which is a public access road which adjoins with the appellants' Lot 255. There is no longer any necessity of an inherent private right of way under s 34 of the SLC to cut through the third respondent's own land to be maintained under s 141 of the SLC. Thus, under the same power of s 141 of the SLC, the Superintendent ought to extinguish the easement; and

(b) upon being aware of the extinguishment application, the appellants merely objected against it but totally failed to answer the issue raised regarding the existence of the public access road via Cooke's Drive. Instead, the appellants merely insisted that an extinguishment of the Easement would be in contempt of the first COA decision.

[21] Upon the Superintendent's careful inquiry and assessment, the Superintendent on 11 July 2019 issued a notice of intent to extinguish the easement to both the appellants and the third respondent ('notice of intent'). The Superintendent had appropriately notified all parties that he intends to publish his intention to extinguish the easement in the *Gazette* and that any cause to the contrary must be shown to him within one month of the publication in the *Gazette*. Thus, at this juncture per se, the appellants should have already been aware and be prudent to refer to the *Gazette* if the appellants had a genuine cause to the contrary against the extinguishment.

[22] Nevertheless, upon the publication of the notice in the *Gazette* vide *Gazette* Notification No 2538 No 36 Vol LXXIV dated 5 September 2019 ('*Gazette* Notification'), the appellants never responded to the *Gazette* Notification and had utterly failed to show any cause to the contrary to the Superintendent within the 30 days' statutory time limit.

[23] As there was no cause shown to the contrary, the first respondent on 14 November 2019 finally registered the extinguishment of the easement on the third respondent's instrument document of title of Lot 254 ('extinguishment endorsement').

[24] However, despite the third respondent's full compliance of the extinguishment application procedures under the SLC and the COA's first decision, the appellants remained insistent to maintain the easement although the necessity for the easement had long ceased to exist. Despite the first respondent's extinguishment of the easement, the appellants on 14 February 2020 still proceeded to send their workmen to pour cement over the third respondent's land which the appellants still incessantly claim to be their easement.

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[25] In response, the third respondent had to instruct her solicitors to issue letters to the appellants' solicitors to protect her rights to extinguish the easement in accordance with the legally registered extinguishment endorsement. To the third respondent's misfortune, the appellants filed an appeal (via originating summons under s 203 of the SLC) against the

extinguishment endorsement registered by the first respondent ('appellants' OS'). Amidst other miniscule matter of technicalities raised by both sides, the appellants' chief complaints are essentially as follows:

(a) the easement is a statutory registered easement and does not depend on the necessity to which the easement was originally granted;

(b) res judicata applies to estop the High Court to determine the subsistence of the easement which had already been allegedly been decided vide the COA's first decision; and

(c) the appellants were deprived of the opportunity to be heard as the first respondent has failed to conduct a formal inquiry under s 141 of the SLC.

[26] However, we are most aware that the common feature in all of the appellants' Submission was that the appellants never even attempt to deny the existence and availability of Cooke's Drive as a public access road to Lot 255. Instead, somehow the appellants kept on insisting *ad nauseam* that the easement was a 'statutory easement' that exists on a statutory footing which somehow was not dependent of the very necessity which brought the easement into existence in the first place.

[27] The learned judicial commissioner ('learned JC') astutely dismissed the appellants' OS and decided as follows in scintillating and resolute terms:

(a) the easement was statutorily registered considering the fact that the manner in which the lands were subdivided in the subject area (involving Lot 254 and Lot 255) vide the sub-division plan in 1966 under the Land (Control of Sub-Division) Ordinance (Cap 82), had left Lot 255 to be landlocked without any access to public roads. Thus, out of necessity to bring Lot 255 out of landlock, the easement was registered via the 66 Memorandum to give Lot 255 the necessary right of way under s 43 of the SLC:

> It was an easement of necessity in that if not for the right of way, Lot 255 would be landlocked and rendered unusable.

(b) the learned JC has rightfully referred to the Court of Appeal decision in *The State Government of Sarawak & Ors v Teo Soo Chuan* [2014] 4 MLJ 114 which had held that in cases where the grant of easement does not stipulate the length of time an easement should subsist (which is the case in the present appeal), the court must examine the purpose and necessity in which the easement was initially granted. If a statutory registered easement was granted out of necessity to alleviate a land from being landlocked, then the easement shall only stand so long as the necessity subsists. If in case the necessity ceases and there arise an alternative access

to Lot 255 (apart from the easement running through the Lot 244), the easement shall no longer subsist and should cease in the same manner the necessity had ceased:

> *Examination of the deeds show no provision limiting the right of way to any part of Lot 27*. Or to any length of time. The shape of Lot 27, and its dimensions and location in relation to the dominant tenements show the *entire Lot 27 provided access for the dominant tenements*.
>
> ...
>
> We conclude, therefore, that:
>
> ...
>
> (b) *it was granted for as long as the dominant tenements needs the right of way.* (Emphasis added)

(c) the learned JC appropriately found that the appellants relied only on bare averments to disprove the availability of Cooke's Drive as a public access road to Lot 255:

> ... the plaintiffs' solicitors in their lengthy letter dated August 6, 2019 *made a one sentence averment* that 'it is clear that there is no other alternative route or means of access to the plaintiffs' land Lot 255 other than the existing registered easement right of way.

(d) the learned JC has appropriately considered that the learned High Court judge in the first High Court Suit, had conducted a site visit during trial and found that the evidence of Cooke's Drive being available as a public access road to Lot 255 was resoundingly obvious and was largely uncontroverted by the appellants:

> The learned High Court judge in the previous litigation *made a site visit* and noted in her judgment that Lot 255 could be accessed through Cooke's Drive.
>
> ...
>
> From the foregoing, *it was clear to the Court that Lot 255 could be accessed through Cooke's Drive*.

(e) the learned JC thus rightfully found that there are no errors in the first respondent's extinguishment endorsement and that there are no reasons whatsoever for the appellants to continue encroaching into the third respondent's land when there is already a public access road that could be connected to Lot 255;

(f) the learned JC astutely found that res judicata does not apply to estop the court from determining the propriety of the extinguishment endorsement as neither the first High Court decision nor the COA's first decision had denied the third respondent's rights to apply for the easement to be extinguished. The learned JC identified, and we agree,

that the first High Court decision refused the third respondent's counterclaim for declaration not because she was not entitled to extinguish the easement, but instead because she was thoroughly and utterly entitled to extinguishment that a court declaration would be unnecessary:

> ... although the High Court did not grant the declaration ... the learned High Court judge made clear that the Court did not do so because it was not necessary *and that it was a given the third Defendant was SO ENTITLED.*

(g) the learned JC identified, and we also agree, that the COA's first decision did not at all disturb the first High Court's decision on the issue of necessity and merely latched onto the issue that estoppel or laches should not override the statutory procedures of extinguishment under the SLC (and that the third respondent had not yet, at the time, properly apply for the extinguishment proper under s 141 of the SLC):

> The appeal before the Court of Appeal did not concern this part of the judgment and *neither did the Court of Appeal comment on this part of the Judgment* ...
>
> ... the Court of Appeal disagreed that there could be such waiver or abandonment of such part of the 'easement right of way' ...

(h) the learned JC had also correctly found that there is nothing in the SLC that imposes upon the first respondent to embark on a 'formal enquiry' in the intricate manner and method in which the appellants insisted should have been conducted by the first respondent. The first respondent had already extended full opportunity to the appellants' solicitors to be involved in the inquiry which ultimately led to the extinguishment endorsement. The appellants cannot cry foul that they somehow were denied the right to be heard when the appellants themselves did not seize the opportunity to materially and substantially dispute the issue regarding the availability of Cooke's Drive as a public access road:

> First, *Section 141 does not contain any requirement that the Registrar must hold a formal inquiry.*
>
> ...
>
> Second, *it could not be argued that the plaintiffs had not been given an opportunity to be heard*, in respect of the application for extinguishment.
>
> ...
>
> *The plaintiffs' solicitors had a copy of the application and as detailed earlier, the plaintiffs' solicitors wrote several letters to the Lands and Surveys Department, setting out the plaintiffs' case and in rebuttal to the letters written by the third Defendant's solicitors.*

[28] Dissatisfied with the learned JC's dismissal of the appellants' OS, the

A appellants filed the present appeal before us.

THE APPEAL BEFORE US

B **[29]** It clearly gleans from our layout of the background facts above that there is absolutely no merit as to the appellants' appeal before us. The excerpts of the learned JC's grounds of judgment reproduced above are exceedingly telling that there is no appealable error which would warrant our appellate intervention against the learned JC's dismissal of the OS.

C **[30]** First and foremost, we are beckoned to highlight that there is no utility at all in the appellants' attempt to distinguish between a 'statutory registered easement' and an 'implied easement of necessity'. It was never put into question that the subject easement was registered under the 66 Memorandum. The appellants altogether failed to appreciate the clear finding of the learned JC.
D Never at any point in time was the learned JC not aware of the fact that the easement was a registered easement under the SLC.

[31] Just because the learned JC identified that the very purpose and
E necessity of the easement was first registered, does not at all mean the learned JC had detracted from the fact that the easement was a statutory registered easement. It is certainly befuddling that the appellants somehow was insinuating that an easement across a neighbour's land can exist or be granted willy-nilly without any appropriate and just necessity. Just because the
F easement was a statutory registered easement does not at all mean that the easement can reign supreme free from any rules of law or principles of justice.

[32] We certainly do not appreciate the appellants' erroneous and intentional twisting of the learned JC's grounds of judgment. The reference to
G the word 'implied' arose in the learned JC's grounds of judgment was not at all an insinuation by the learned JC that the easement was an 'implied easement'. Instead the learned JC has rightfully stated that the easement was initially created to accommodate the *implied rights of a proprietor under s 34 of the SLC* which also includes the right to access his land 'without boats or vehicles':

H > Nothing turns on whether the 'easement right of way' in the instant case *was created under Section 34 of the Sarawak Land Code* ... the 'easement right of way' was an easement of necessity, created for the purpose of allowing land (Lot 255) which would otherwise be landlocked, access to a public road.'

I **[33]** We are pressed to remind that the remedy of an easement or right of way is a thoroughly critical matter that should not be taken lightly as it involves the inevitable encroachment and surrender of another registered proprietor's rights to the use and enjoyment of a portion of his own land. It cannot simply exist or remain to exist without just cause and mere registration of such an easement

does not insulate the easement from the very principles of justice and fairness in which it was first granted.

[34] We agree with the third respondent's reference to the case of *Si Rusa Inn Sdn Bhd & Ors v The Collector of Land Revenue Port Dickson & Ors* [1987] 1 MLJ 147 which had touched on the reasonable instances where a private right of way can be granted. The dominant tenement must prove that the justification for the easement transcended beyond mere inconvenience and reached the threshold of sheer necessity:

> Next, was it reasonable in the circumstances to grant the private right of way? In Liew Peck Lian's case, it was held that 'reasonably' did not mean 'conveniently.' With respect I agree, for were it otherwise, the floodgates would definitely be opened for similar applications in future; possibly made with complete abandon. *There must be something more than just mere inconvenience* or convenience; some situation that partakes of gravity or *urgent necessity.*

[35] This principle is certainly more telling in view of the salutary words in the decision of Augustine Paul JC (as His Lordship then was) in the case of *Liow Tow Thong & Ors v Pentadbir Tanah Alor Gajah & Ors* [1998] 1 MLJ 79 which had held that granting an easement although an alternative access already exists is an unlawful exercise of discretion:

> *It is settled law that where there is an alternative right of way available, the land administrator must take that fact into consideration.* The authorities indicate in crystalline terms that the grant of a right of a way, *when another one already exists, though less convenient, is a wrongful exercise of discretion*. Since the defendants only elected to proceed against the plaintiffs, it was manifestly patent that the creation of that right of way was anchored on convenience without a consideration of other relevant circumstances. This was a violation of s 390(3) of the NLC (see p 85G-I); *Liew Peck Lian & Ors v The Conservator of Forests, Johore* [1961] MLJ 117, *Si Rusa Inn Sdn Bhd & Ors v The Collector of Land Revenue Port Dickson & Ors* [1987] 1 MLJ 147 and *Vadivelu a/l Palanisamy v M Radhakrishnan* [1995] MLJU 44; [1996] 1 CLJ 224 followed. (Emphasis added.)

[36] It is thoroughly perplexing that the appellants still insisted on the easement's subsistence in the face of these clear and unequivocal precedents which directly negate the entirety of the appellants' wrongful claim.

[37] We have taken the liberty to plough through the entire breadth of the appellants' Submissions, both the main and reply submission. The appellants have altogether failed and in fact squirrelled away from any meaningful or substantial challenge against the irrefutable existence of an alternative public access road via Cooke's Drive. Much to our disdain, the appellants kept harping on the fact that the easement was an 'express registered statutory easement', which does not add any credence whatsoever to the appellants' case. It was

never in dispute that the easement was a registered easement under the 66 Memorandum. Even the third respondent was well aware of that fact. There was never any issue of an 'implied easement'.

[38] Furthermore, it was utterly apparent from the subdivision plan and the 66 Memorandum that the easement was registered in view of affording the appellants their implied rights under s 34 of the SLC to access Lot 255. It is entirely confounding that the appellants kept on referring to the case of *Kettel and others v Bloomfold Ltd* [2012] EWHC 1422 (Ch) ('*Kettel*'s case') as a purported authority to support their claim when the facts in *Kettel*'s case were entirely and utterly different and irrelevant to the present case. In *Kettel*'s case, the English High Court did not deal with the issue of access (or absence of access) between adjacent lands. Instead, the English High Court dealt with the determination whether car parks provided in leases for leaseholders in a Development should be considered a demise or an easement. The entire essence and premise of *Kettel*'s case is wholly dissimilar and irrelevant to the present appeal. The term 'easement' in *Kettel*'s case was not even discussed in the terms of a right of way or access to land. Instead it was used for the court to determine the nature of a car park which was provided for under a lease by the proprietor of a development.

[39] The 'easement' in the form of car parks in *Kettel*'s case had nothing to do with any fundamental or inherent necessity of access to land. Instead, the easement in *Kettel*'s case was premised on the convenience of a car park stipulated under a lease. There the English High Court stated that the developer cannot simply move the car park as they please as the car parks do not impede on the developer's rights as proprietor to such an extent that made the developer's ownership of it 'illusory'. Thus, there was no necessity for the car parks to be moved although there were alternative spaces available.

[40] The facts of the present appeal are resoundingly different. Here, the term 'easement' was made in reference to 'right of way' and not car parks. Here, the easement was initially granted because of the sheer necessity of access to bring Lot 255 out of landlock and not mere convenience to park vehicles. Here, the easement stood and existed on the necessity of access and not mere convenience of parking cars. Here, the necessity had already ceased when Cooke's Drive became available for public access road. Here, the easement transcended mere issue of convenience. Here, the easement if it continues to subsist (notwithstanding the availability of an alternative access), the easement will indeed impede on the third respondent's rights to that portion of Lot 254 to the extent of making her ownership over that portion of Lot 254 illusory (as the third respondent would be unnecessarily deprived of that portion of her Land).

[41] Considering our deliberation above, we are in full agreement with the learned JC (as well as the Court of Appeal's principle in *The State Government of Sarawak & Ors v Teo Soo Chuan* [2014] 4 MLJ 114) that the easement can only stand when the necessity for access subsists. The moment the necessity ceases (due to the availability of Cooke's Drive) it would thoroughly be unjust to prolong the deprivation of that portion of Lot 254 from the third respondent. Thus, we ultimately agree that the learned JC was correct in finding that the first respondent's extinguishment of the easement was valid in law.

[42] Secondly, as we have mentioned above when we setup the facts, there was no merits whatsoever to the appellants' reliance on the doctrine of res judicata. Neither the first HC decision nor the COA's first decision decided against the third respondent's rights to at least apply for the easement to be extinguished under the law. At best, the COA's first decision only went as far to remark that the third respondent had not yet applied for the extinguishment under the relevant law (which the third respondent later indeed proceeded to do so).

[43] Thus, during the first COA proceeding, the Court of Appeal then had opted not to discuss the merit of the third respondent's right to extinguishment and only proceeded to decide on the basis of procedures (or lack thereof). It is trite law that res judicata does not apply until and unless the matter was decided on its merits. We find guidance in the decision of the Court of Appeal in the case of *Messrs Roland Cheng & Co v Konkamaju Sdn Bhd* [2014] 1 MLJ 894:

> *In present case however, there was no decision on the merits* of the third party claim of solicitor's lien on the title deed being made by the deputy registrar in dismissing the third party's interpleader summons. Though in the excerpts of the affidavits by the third party and the defendant filed in the interpleader summons (as quoted in earlier part of this judgment) the issue of solicitor's lien on the title deed was averred to, this was not discussed or referred to in deputy registrar's ground of decision. *In other words, the merits of the solicitor's lien as claimed by the third party was never at any stage determined by the court*. Therefore, it is our view that the *learned High Court judge had fallen into error when he concluded that the third party cannot claim a solicitor's lien over the title deed to the property as it is res judicata* by reason of the deputy registrar's decision dated 6 August 2010. (Emphasis added.)

[44] Considering the outright unlawfulness of the appellants' claim, all other ancillary technical contentions raised by the appellants are already moot. Nonetheless, for the sake of completion we will address this issue albeit very briefly. We are aware that the learned JC had appropriately appreciated that the appellants' solicitors were not only aware, but were directly involved in the correspondences during between the first respondent and third respondent during the first respondent's inquiry under s 141 of the SLC. In fact, the

A appellants' solicitors had indeed taken the opportunity to try to object against the extinguishment of the easement. And it is upon considering the appellants' lacklustre objection that the first respondent had appropriately dismissed the appellants' objection.

B **[45]** The appellants were given full opportunity to show any cause against the extinguishment of the easement, but had only opted to throw the first HC decision and the COA's first decision to the first respondent's face. Never at any time did the appellants ever furnish any material or substantial challenge against the availability of Cooke's Drive as a viable public access road.

C

[46] Furthermore, we agree with the learned JC that there were no provisions whatsoever within the law to support the appellants' insistence that a 'formal inquiry' must be conducted by the first respondent before the
D extinguishment. In fact, even if there was any requirement for such formal inquiry, we find that the series of correspondences which involved the appellants' solicitors, and calls for show cause were already clear evidence of a formal inquiry conducted by the first respondent.

E OUR DECISION

[47] Considering all of the above deliberations, we hereby dismiss the present appeal *in toto*. For clarity's sake, we fully agree with and maintain the learned JC's decision to dismiss the appellants' OS.

F

[48] We are beckoned to remark that in good neighbourly spirit, and in full awareness of the law and facts, the appellants ought to have known very well that Cooke's Drive presented a viable public access road to access Lot 255
G without having to unnecessarily encroach their neighbour, the third respondent's land.

[49] The full expiration and extermination of the easement's necessity was resoundingly obvious. This was very clear to the third respondent and the
H neutral first and second respondents who both have no personal interest whatsoever in Lot 254. Even against these glaring facts, the appellants still saw it fit to continue unnecessarily depriving the third respondent of her land. With no just cause whatsoever the appellants still proceeded to drag all parties before the court to unjustly encroach upon the third respondent's land.

I

[50] The third respondent had been encumbered by the easement, and vexed the appellants' litigation long enough. We accordingly award costs of RM20,000 to be paid by the appellants to the third respondent, subject to allocator.

[51] We also award costs of RM10,000 each to the first and second respondents to be paid by the appellants. There shall be no order of allocator in respect of the costs awarded to the first and second respondents.

Appeal dismissed in toto with costs of RM10,000 for each of first and second respondents and RM20,000 for third respondent.

Reported by Dzulqarnain Ab Fatar